plaintiff had voluntarily assumed the risk of injury was raised and rejected by Starke J. There was no appeal on this point and little reference to it in the High Court, suggesting it was not the basis of the rule. Thus it seems that the general principle of the common law which constrained the Court to make its decision is that which finds its most notable expression in the civil law in the policy of the maxim *ex turpis causae non oritur,* that is, that it is not the function of the civil courts to supervise the actions of those who flaunt the law.

The sphere of operation of the rule is demarked vaguely by Windeyer J. The rule he insists, as do the other members of the Court, is made in respect of negligence, having no general application to the law of torts, and even in respect of negligence will apply only where the plaintiff and defendant are engaged in a joint criminal activity. Windeyer J. refused to accept insignificant distinctions as to the type of criminality which would attract the rule, for example, felony or misdemeanour, summary or indictable offences, saying these questions should be decided as they arose. Though His Honour suggests the rule will not generally apply to offences of the nature of traffic regulations, for example driving an unregistered vehicle unless the accident occurred simply through the 'quality of the thing' not the 'user of the thing'.[8] The Court also made it clear the rule did not require a causal link between the injury and the criminality. The tort must 'arise out of the crime',[9] but there need be no strict causal link. 'The question is whether the harm arose from the manner in which the criminal act was done.'[10] Thus the width of the rule has yet to be determined — it will turn on the interpretation of 'joint criminals' and criminal activity for the purposes of the rule. For example, can one be jointly guilty of drunken driving? If so, what is the requisite *mens rea*? This lack of definition of the width of the rule must be the main argument with the High Court decision.

The decision was inevitably an intuitive one and that the intuition of each member of the Court led to the same result and for substantially the same reasons despite the Court's semantic quibbles, gives the decision considerable authority. Thus the feeling of the High Court is that recovery should be barred to the joint criminals who negligently injure one another. Nevertheless the decision seems regrettable. Within the bounds of fault liability there seems to be no reason to deny recovery to the injured plaintiff because he was criminally engaged at the time of the injury. The issue of criminality seems extraneous to the question being dealt with, that of negligence.

CATHERINE HOUSLEY

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Blood alcohol content—Victoria and England

The purpose of this note is to outline the approach of the Supreme Court of Victoria to breathalyser legislation and to contrast it briefly with the judicial approach of English courts to Part I of the Road Safety Act 1967 (U.K.).

[8] *Ibid.* 88.
[9] *Ibid.* 87.
[10] *Ibid.* 87.

The relevant Victorian provisions are section 408A of the Crimes Act 1958, inserted in 1961,[1] and section 81A of the Motor Car Act 1958, inserted in 1965.[2] The former permits the introduction of the results of a breath analysis as evidence of blood alcohol content, a relevant factor in a number of driving offences. These include the crime of driving a motor car with a blood alcohol content of more than .05 *per cent;* this offence having been created by section 81A. Section 408A provides for self-incrimination by a motorist — failure to give a breath sample (or a blood specimen) is itself an offence.[3]

The Supreme Court has not been unfavourable to motorists when cases have come before it concerning police procedure from the time of the alleged driving offence to the time of the breath test itself. Sholl J. was explicit in *Scott v. Dunstone*:[4]

> [Section 408A] is a provision designed to procure from a suspect . . . evidence which may incriminate him . . . such provisions cut across the ordinary common law principle against self incrimination, and should be strictly construed.

His Honour went on to list requirements, which, if not carried out, would justify a refusal by a motorist to give a sample of his breath.[5] The police had failed to conduct the test as they should have and so were unable to obtain a conviction.

A similar approach was taken by Newton J. in *Mintern-Lane v. Kercher*.[6] The defendant had refused to submit to a breathalyser test when the test was requested in a car parked outside a closed police station. Newton J. held this was not 'at' the nearest police station as was then required by section 408A(4)(b)(ii).[7] Accordingly Mr. Kercher was not guilty of any offence, and his motives in refusing to provide a breath sample were irrelevant.[8] Had the driver complied with the police request and had the test shown his blood alcohol content to be greater than .05 *per cent,* he would have been liable to conviction under section 81A of the Motor Car Act. In *Genardini v. Anderton*[9] it was said:[10]

> The fact that the defendant was under no obligation to submit to the breath analysis tests which he in fact underwent . . . does not produce the consequence that the results of those tests were inadmissible in evidence.

The defendant had voluntarily taken the tests at a police station other than the one nearest the driving incident and so his conviction stood.[11]

This attitude is in direct contrast to that of the English courts which have rejected evidence of a blood analysis because of some defect arising in the

[1] Crimes (Breath Test Evidence) Act 1961, s.2. This section has been amended frequently.
[2] Motor Car (Driving Offence) Act 1965, s.2.
[3] S.408A(5).
[4] [1963] V.R. 579, 581.
[5] *Ibid.* 581-2.
[6] [1968] V.R. 552.
[7] By s.2 of the Crimes (Evidence) Act 1968, this section was altered to provide for breath tests in 'the grounds or precincts' of locked police stations. The approach of Newton J. remains significant despite this amendment.
[8] [1968] V.R. 552, 555.
[9] [1969] V.R. 502 (Newton J.).
[10] *Ibid.* 505.
[11] See also *Smith v. Maddison* [1967] V.R. 307 where the fact that the test was administered more than the specified maximum of two hours after the driving incident was relevant only to the conclusive nature of the breath analysis. The test was still admissible as evidence.

course of administering a preliminary breath test.[12] In *Campbell v. Tormey*,[13] for example, the accused went voluntarily to the police station. There was no formal arrest;[14] it was held that the police behaviour was irregular and that this irregularity justified an acquittal.

Once the breath test has been taken section 408A (as amended) has set out provisions for the delivery of a certificate containing the result of the test[15] and for the tendering of this evidence in court.[16] On a number of occasions defendants have put forward technical defences based on these provisions but they have generally failed.[17] Only in *Hanlon v. Lynch*[18] and *Ross v. Smith*[19] have such defences succeeded and the effect of these decisions has been minimized by later cases and parliamentary action. The latter case was dealt with in *Durston v. Mercuri*.[20] There a prosecution which would have failed if only verbal evidence was given of the existence of the necessary certificate, succeeded because the police produced a carbon copy of the certificate. The conviction was upheld. The Full Court readily acknowledged in *White v. Moloney*[21] that certain amendments to section 408A had been intended by Parliament to counteract the consequences of the decision in *Hanlon v. Lynch* and so this case will no longer be followed.

Therefore, unlike the English courts, which at least until the House of Lords' decision of *D.P.P. v. Carey*[22] were quite ready to give drivers the benefit of technical defences under dissimilar blood alcohol legislation,[23] the Victorian courts have taken a moderate view of such defences. Requirements directly relating to the administration of breath tests have been carefully scrutinized and a number of questions have been resolved in the accused's favour. But where the defence has been based on defects in police procedure occurring after the test, and where these procedures have, in substance, been complied with, the courts have been reluctant to approve a dismissal. Where relief has been granted Parliament has intervened.

Certainly in the later Victorian cases there has been a readiness to apply the spirit as well as the letter of the law. This may be partly explained by a responsiveness on the part of the Supreme Court to legislative change. It was the refusal of Herring C.J. to acknowledge the breathalyser as a reliable scientific instrument in *Porter v. Kolodzeij*[24] that prompted the enactment of section

[12] For a broad survey of defences see Rook and Harvey, 'The Breathalyser—Defences' (1970) 120 *New Law Journal* 19.

[13] [1969] 1 All E.R. 961 (Q.B.D.); see also *Alderson v. Booth* [1969] 2 All E.R. 271 (Q.B.D.).

[14] S.2(4) of the Road Safety Act 1967 (U.K.) provides for the arrest without warrant of a motorist who appears, as the result of a breath test, to have an excessive blood alcohol content.

[15] S.408A(2).

[16] S.408A(2A).

[17] *Durston v. Mercuri* [1969] V.R. 507 (Menhennitt J.); *White v. Moloney* [1969] V.R. 705 (F.C.); *Creely v. Ingles* [1969] V.R. 732 (Little J.).

[18] [1968] V.R. 613 (F.C.).

[19] [1969] V.R. 411 (Winneke C.J.).

[20] [1969] V.R. 507, 510-1.

[21] [1969] V.R. 705, 709.

[22] [1969] 3 W.L.R. 1169; [1969] 3 All E.R. 1662. For comments following this decision see: Bloom, 'The Breathalyser Breathes Again' (1969) 119 *New Law Journal* 1147.

[23] For an introduction to the English legislation see: Fitzgerald and Pole, 'Road Safety Act 1967' (1969) 119 *New Law Journal* 43, 61. For a general survey of the English decisions see Ruoff, 'Links with London' (1967) 41 *Australian Law Journal* 398, (1970) 44 *Australian Law Journal* 43.

[24] [1962] V.R. 75.

408A. Since then Parliament has not lost the initiative. The decisions in *Hanlon v. Lynch*[25] and *Mintern-Lane v. Kercher*[26] have been overruled by statute. In short, it has been accepted that 'Parliament is its own master of linguistic presentation'.[27]

Why has not a similar approach emerged in England? Unless the English courts have suspected police of conducting random tests, which are clearly excluded from the statutory scheme, it cannot be argued that English motorists' rights are in greater jeopardy than their Victorian counterparts. On the contrary a case can only reach court and a conviction can only be recorded when a blood test has been taken following preliminary and rudimentary breath tests. Thus the English motorist has the benefit of two entirely different types of test. It is difficult to understand why trifling errors in the administration of the breath test were not ignored when indisputable evidence was before the court in the form of a blood analysis.

The differing approach in England may stem from the heavier penalties that apply there.[28] Not only are potential prison sentences longer than in Victoria, but the compulsory disqualification from driving for a first offence is twelve,[29] as opposed to three, months.[30] It is of interest that the Victorian Parliament has in both 1965, when it introduced compulsory disqualifications,[31] and in 1967, when it increased the period of disqualification for second and subsequent convictions,[32] intervened on the matter of penalties. The British Parliament has made no attempt to amend the legislation while the Victorian legislature has. This difference may be fundamental to the differing approach of the courts.

F. C. O'BRIEN

[25] [1968] V.R. 613, see *supra* n. 18.
[26] [1968] V.R. 552, see *supra* n. 8.
[27] *Smith v. Ferguson* [1967] V.R. 757, 759 (F.C.).
[28] Certainly the Council of the English Law Society is worried by the disqualification provisions: 'Road Safety Act 1967—Who's to Blame?' (1969) 119 *New Law Journal* 1155; see also Bloom, 'Disqualification—"Special Reasons"' (1970) 120 *New Law Journal* 29.
[29] Road Safety Act 1967 (U.K.), s.5(2).
[30] Motor Car Act 1958, s.3(a).
[31] By s.13 of the Motor Car Act 1967.
[32] By s. 4(a) of the Motor Car (Amendment) Act 1969.